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**SFA****BILL ANALYSIS**

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Senate Bill 1045 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator William Van Regenmorter  
Committee: Families, Mental Health and Human Services

Date Completed: 3-8-00

## RATIONALE

The Estates and Protected Individuals Code (EPIC) was enacted in 1998 to replace the Revised Probate Code, and will take effect on April 1, 2000. Although the Revised Probate Code (RPC) was viewed as a major overhaul when it was enacted in 1978, many people came to believe that a complete reorganization was necessary, and the Council of the Probate and Estate Planning Section of the State Bar spent approximately 10 years reviewing the entire RPC. The revisions made by EPIC reflect changes in rules, case law, and society that occurred since the RPC was adopted, and address internal inconsistencies present in that statute. Substantive differences between EPIC and the RPC include the addition of a prudent investor rule; the modification of supervised probate proceedings; a new requirement that certain dollar amounts be adjusted by a cost-of-living factor; and the inclusion of detailed provisions governing the administration of trusts and the powers of trustees.

The delayed effective date of EPIC allowed a two-year transition period during which practitioners and judges could familiarize themselves with the new law. The Council of the Probate and Estate Planning Section has scrutinized EPIC and discovered various ambiguities and inconsistencies. The Council has suggested a number of revisions to EPIC.

## CONTENT

**The bill would amend the Estates and Protected Individuals Code in regard to intestate succession, dower, the execution of wills, disallowed claims, the appointment of a lawyer-guardian ad litem, and other matters. The bill also would repeal several statutes that will be replaced by EPIC, as well as a section of the Code.** The bill would take effect on April 1, 2000.

Currently, EPIC allows a person, including a guardian ad litem, conservator, or other fiduciary, to waive notice and consent to the granting of a petition by a writing signed by the person or the person's attorney and filed in the proceeding. The bill also

specifies that, if every person affected by a proceeding waived notice and consented in writing to the granting of a petition, the court could enter an appropriate order on the petition without a hearing. As currently provided, a person for whom guardianship or other protective order was sought, a ward, or a protected person could not waive notice.

With several exceptions, EPIC states that, for purposes of intestate succession (inheritance in the absence of a valid will) by, through, or from an individual, an individual is the child of his or her parents, regardless of their marital status. The parent and child relationship may be established by various methods described in the Code. Among these, if a child is born out of wedlock or is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if one of several events occur. The bill would add to these that, regardless of the child's age or whether or not the alleged father had died, the court with jurisdiction over probate proceedings relating to the decedent's estate determined that the man was the child's father, using the standards and procedures established under the Paternity Act.

The bill specifies that a surviving widow of a decedent who was domiciled in Michigan and who died intestate could file with the court an election in writing to take either her intestate share under EPIC or her dower right under the Revised Statutes of 1846 (MCL 558.1-558.29). The widow would be limited to one choice. If the intestate decedent's widow failed to make an election within the time specified in EPIC, it would be conclusively presumed that she elected her intestate share.

The Code provides that a will may be simultaneously executed, attested, and made self-proved by acknowledgment of the will by the testator and two witnesses' sworn statements, made before an officer authorized to administer oaths and evidenced by the officer's certificate. (This affidavit constitutes admissible evidence that the will was properly

executed, which makes it a “self-proved” will.) The bill provides that, instead of a testator and witnesses each making a sworn statement before an officer authorized to administer oaths, a will or codicil could be made self-proved by a written statement that was not a sworn statement. The statement would have to state or incorporate by reference to an attestation clause, the facts regarding the testator and the formalities observed at the signing of the will or codicil. The testator and witnesses would have to sign the statement.

The Code provides that a will executed in the form prescribed in the Code and otherwise in compliance with the terms of the “Michigan statutory will form” is a valid will. The bill would remove a requirement that witnesses to the will be persons who will not receive assets under the will.

Under EPIC, to be effective to prove the transfer of property or to nominate a personal representative, a will must be declared valid by a probate register’s order of informal probate or by a court’s adjudication of probate. Under the bill, this requirement would not apply to the collection of assets under Section 3983 of EPIC (which allows the collection of debts owed to a decedent, or personal property belonging to a decedent, by presentation to the person who owes the debt or has the property, of the death certificate and a sworn statement by someone claiming to be the decedent’s successor, in cases in which the estate does not include real property and its entire value does not exceed \$15,000).

Currently, an application for informal probate or informal appointment must be made by an interested person and directed to the register. The bill specifies that, if an application were not filed within 28 days after a decedent’s death, a person who had a right or cause of action that could not be enforced without administration or appointment could file an application.

The Code states that a formal testacy proceeding is litigation to determine whether a decedent left a valid will. An interested person may commence a formal testacy proceeding by filing a petition, as described in EPIC. The bill also would allow a person who had a right or cause of action that could not be enforced without administration to commence a formal testacy proceeding in that manner.

The bill provides that an interested person or a person who had a right or cause of action that could not be enforced without appointment could file a petition for a formal proceeding regarding the priority or qualification of a prospective or appointed personal representative.

Under EPIC, if a creditor’s claim is presented in the manner and within the time limit prescribed in the Code, the personal representative may notify the claimant that the claim has been disallowed in whole or in part. The claim is barred to the extent disallowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative. Under the bill, the claimant would have to commence a proceeding against the personal representative; filing a petition for allowance would not be an option. (The bill also would make similar changes in regard to a trustee’s disallowance of a claim, by providing that a disallowed claim would be barred unless the claimant commenced a proceeding against the trustee; filing a petition for allowance would no longer be an option.)

The Code provides that, if a person does not make a claim to funds deposited with a county treasurer by a fiduciary, before the expiration of three years after the deposit date, the money that would have been distributed to the person, if alive, must be distributed to each person who would be entitled to the money if the person were deceased, and the person is forever barred from all claim or right to the money. The bill would refer to a person “whose whereabouts are unknown or who declined to accept the money” before the expiration of three years after the deposit date. The bill also require distribution to each person who would be entitled to the money if the person “had died before the date that he or she became entitled to the money” (rather than “were deceased”).

The Code contains rules that apply to the allocation

and payment of estate, inheritance, and death taxes concerning property included in an estate. If a direction in a governing instrument (e.g., a will or trust agreement) differs from what is provided in these rules, the direction is effective to allocate and pay tax only with respect to property subject to that instrument's control and with respect to the tax that is being levied. The bill also provides that, if the governing instrument were signed on or after September 6, 1963 and before April 1, 2000, and directed apportionment of taxes by reference to the Uniform Estate Tax Apportionment Act (former Public Act 144 of 1963), or by reference to another law of this State that was in effect when the instrument was executed, the apportionment rules provided in the referenced law would control the apportionment of taxes under that governing instrument.

Section 5213 of EPIC provides for a hearing on a petition for the appointment of a minor's guardian. If the court determines that the minor's interests are or may be inadequately represented, the court may appoint an attorney to represent the minor. The bill would refer to a lawyer-guardian ad litem, rather than an attorney. The bill specifies that a lawyer-guardian ad litem appointed under EPIC would represent the child and have the powers and duties set forth in Section 17d of Chapter 12a of the Revised Probate Code (as added by Public Act 481 of 1998). All of the provisions of that section would apply to a lawyer-guardian ad litem. In addition, the following would apply:

- The lawyer-guardian ad litem could file a report and recommendation, which the court could read. The court could not admit the report and recommendation into evidence, however, unless all parties stipulated the admission. The parties could make use of the report and recommendation for purposes of a settlement conference.
- After a determination of ability to pay, the court could assess all or part of the costs and reasonable fees of a lawyer-guardian ad litem against one or more of the parties involved in the proceedings or against the money allocated from marriage license fees for family counseling services under Public Act 128 of 1887. A lawyer-guardian ad litem could not be paid a fee unless the court first reviewed and approved it.
- To assist the court in determining a child's best interest, the court could appoint a guardian ad litem for a child involved in a proceeding under Section 5213.

The Code provides that testamentary appointment of a guardian under a will probated under Article III terminates if the will is later denied probate under a supervised probate proceeding. The bill provides,

instead, that testamentary appointment of a guardian under a will informally probated under Article III would terminate if the will were later denied probate in a formal testacy proceeding.

The bill would repeal Public Act 185 of 1966 (MCL 555.81-555.84), which is replaced by Section 7207 of EPIC; Public Act 177 of 1937 (MCL 555.201-555.203), which is replaced by Part 5 of Article I of EPIC; and the Uniform Estate Tax Apportionment Act (MCL 720.11-720.21), which is replaced by Sections 3920 through 3923 of EPIC. The bill also would repeal Section 3108 of EPIC, which provides for a special statute of limitations on a cause of action that belonged to a decedent and that was not barred as of the date of the decedent's death.

MCL 700.1103 et al.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

According to the Council of the Probate and Estate Planning Section of the State Bar, all of the proposed amendments to EPIC are technical in nature. Several of the changes, for example, pertain to a widow's right to choose between her intestate share under EPIC and her dower under another statute. When the EPIC legislation was being considered, the right to dower was removed at one point but ultimately retained; the bill's provisions on this subject would reflect the continuation of dower rights under EPIC.

Another amendment in the bill would confirm that an unprobated will could be the basis for asserting the right to collect personal property of up to \$15,000 in value, pursuant to the new affidavit procedure in Section 3983. Also, EPIC states that the signing of a will by an interested witness does not invalidate the will or any provision of it; the bill would bring the Michigan Statutory Will form into conformity with this language. Other changes would make it clear that a person who is neither an heir nor an estate beneficiary, but is entitled to share in a recovery for wrongful death, could apply for informal probate or informal appointment, commence a formal testacy proceeding, or petition for a formal appointment proceeding.

In regard to disallowed claims against an estate or trust, EPIC states that a person making a claim may commence a proceeding or file a petition for allowance. Under the Michigan Rules of Court, however, a person whose claim is disallowed must

commence a civil action. The bill would remove misleading provisions in EPIC referring to a petition for allowance.

After EPIC was enacted in 1998, other legislation amended several statutes, including the RPC, to provide for the appointment of a lawyer-guardian ad litem to represent the interests of a child in certain proceedings. The bill would make corresponding changes to EPIC.

In addition to repealing several statutes that will be replaced by EPIC, the bill would repeal a section of the Code that provides a special statute of limitations on a cause of action that belonged to a decedent prior to his or her death. This section conflicts with a provision of the Revised Judicature Act, which establishes a different period of limitations for such a cause of action.

These and other changes would clear up ambiguities in EPIC, remove inconsistencies within the Code as well as between the Code and other laws, and prevent confusion when EPIC takes effect on April 1.

Legislative Analyst: S. Lowe

#### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.